IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN THE MATTER OF:

RALPH CLAPP ROGERS,

RESPONDENT

ON APPEAL FROM THE

NORTH CAROLINA SUPREME COURT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

(1). Whether North Carolina General Statute 122-58.8(b), et. seq., which applies special commitment and release provisions for those civilly committed after being charged with a violent crime and found not guilty by reason of insanity or incapable of proceeding to trial, violates the Equal Protection Clause of the Fourteenth Amendment by applying these additional provisions to both groups within this classification?

(2). Whether the provisions of North Carolina General Statute 122-58.8(b), et. seq., which became effective July 1, 1981, and which applies special commitment and release provisions for those civilly committed after being charged with a violent crime and found not guilty by reason of insanity or incapable of proceeding to trial, violates the ex post facto provisions of the United States Constitution by being applied to an individual who was committed as the result of being criminally charged prior to the effective date of the statutory provisions?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. _____

IN THE MATTER OF:

RALPH CLAPP ROGERS,[1]

RESPONDENT

ON APPEAL FROM THE

NORTH CAROLINA SUPREME COURT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals (App. A, infra, 1a), is reported at 63 N. C. App. 705 (1983). The decision of the North Carolina Supreme Court was not reported at the time of the taking of this appeal (App. B, infra, 7a). The original opinion of the District Court for the Ninth Judicial District (App. C, infra, 9a), is not reported.

JURISDICTION

Respondent/Appellant contends that N. C. Gen. Stat. 122-58.8(b), et. seq.,(App. F, infra, 17a), is unconstitutional in that it violates his rights to the equal protection of the laws. U.S. CONST., amend. XIV. Respondent/Appellant further contends that the specific application of the provisions in question to him violates the ex post facto law prohibitions of Article 1, section 10(1) of the United States Constitution. The judgment of the

1. The parties involved in this matter are: the State of North Carolina, who currently has the Respondent/Appellant in custody, and the Respondent/Appellant, Ralph Clapp Rogers.

North Carolina Court of Appeals (App. A, infra.), holding N. C. Gen. Stat. 122-58.8(b), et. seq., constitutional and applicable to the Respondent/Appellant in this matter was entered on September 6, 1983. The North Carolina Supreme Court, upon motion of the Attorney General of North Carolina, dismissed Respondent/Appellant's appeal in this matter, and denied Respondent/Appellant's petition for discretionary review in a judgment entered November 3, 1983 (App. B, infra.). A Notice of Appeal to this Court was filed on January 23, 1984 (App. E, infra, 16a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2). HUFFMAN V. PURSUE, LTD., 420 U.S. 592, reh. den. 421 U.S. 971 (1975); COHEN V. CALIFORNIA, 403 U.S. 15, reh. den., 404 U.S. 876 (1971).

CONSTITUTIONAL AND STATE STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in part:

> . . . (N)or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

Respondent/Appellant contends that N. C. Gen. Stat. 122-58.8(b), et. seq., (set out in its entirety in App. F,infra, 17a), violates this guarantee. Respondent/Appellant further contends that the application of these provisions to him violate the prohibition set out in Article I, section 10(1) of the United States Constitution, which states, in part:

> No state shall . . . pass any . . . ex post facto law . . .

STATEMENT OF THE CASE

One question involved in this case is whether N. C. Gen. Stat. 122-58.8(b), et. seq., creates an improper classification of persons by grouping together persons committed as a result of being charged with a violent crime and found not guilty by reason of insanity, and persons committed as a result of being charged with a violent crime and found incapable of standing trial, and applying

restrictive provisions to both groups. These provisions (known locally as House Bill 95; App. D, infra, 12a) were ratified by the North Carolina General Assembly on June 10, 1981, to become effective July 1, 1981. The title to the act gave the stated purpose of the legislation as being "AN ACT TO PROVIDE JUDICIAL REVIEW OF A PSYCHIATRIST'S DETERMINATION TO RELEASE AN INVOLUNTARILY COMMITTED MENTAL PATIENT WHO HAS COMMITTED VIOLENT ACTS". The legislation provides, inter alia, that at least 15 days prior to a patient's discharge or conditional release, if he falls within the provisions of the act, the hospital must notify the clerk of superior court in the county where the hospital is located that the patient is no longer in need of hospitalization. The clerk is to schedule a hearing to determine "the appropriateness of respondent's release", and is to notify the chief district court judge, the district attorney, and the clerk of the superior court in the county from which the patient was committed. The district court judge who presides at this scheduled hearing is to determine whether or not the patient is released.

Prior to the effective date of this legislation, Article 5A of Chapter 122 of the North Carolina General Statutes stated that a patient was to be released unconditionally when the treatment facility determined that the patient was no longer in need of hospitalization. These provisions still apply to those patients who are not committed as a result of being charged with a violent crime. The release of a patient charged with a criminal offense was accomplished in accord with any directions specified in the order initiating the commitment process or any subsequent order. These directions generally required release into the custody of local law enforcement officials for further action on the criminal charges.

This case also raises the question of whether these provisions can be constitutionally applied to persons committed as the result of being charged with a violent crime prior to its effective date. The legislation provides that at any scheduled rehearing

a patient who fits the criteria of the provisions can be subjected to them, even if his initial commitment hearing was prior to the date of the legislation. This legislation was ratified by the North Carolina General Assembly in June, 1981, with a stated effective date of July 1, 1981. The legislation, while not being codified under chapters of the North Carolina General Statutes dealing with crimes or criminal procedure, affects only those who have been charged with violent criminal activity.

The foundation for the immediate case was laid in 1975, when Mr. Rogers, the Respondent/Appellant, was charged with certain criminal acts. On December 21, 1975, in File No. 75CR6339, Mr. Rogers was charged with murder, and in File No. 75CR6340, he was charged with a crime against nature. Between this time and November, 1978, Mr. Rogers was placed in various institutions under the direction of either the Department of Corrections or the Department of Human Resources. Numerous hearings were held dealing with these charges and with Mr. Roger's ability to stand trial or enter a plea. At one such hearing on November 3, 1976, the State was prepared to dismiss the murder charge upon the entry of a plea of no contest to the charge of crime against nature, but no plea was entered because the Court found that the Respondent/Appellant was incapable of giving the necessary information for the entry of the plea. Finally, on November 9, 1978, an order was entered by the Honorable Hamilton H. Hobgood, Superior Court Judge, ordering that proceedings be begun against Mr. Rogers, to involuntarily commit him to John Umstead Hospital. The order was based on a finding that Mr. Rogers was incapable of proceeding to trial on the charges, and it further ordered that should the officials of John Umstead Hospital plan to release him, the Granville County Sheriff's Department was to be notified, through the office of the Clerk of Superior Court. At a hearing held November 16, 1978, before the Honorable C. W. Wilkinson, Jr., District Court Judge, the Court found that Mr. Rogers met the commitment criteria by being mentally ill and imminently dangerous to himself or others, and

ordered that he be committed for a period of 45 days. Mr. Rogers remained at John Umstead Hospital thereafter through a series of regularly scheduled rehearings. Mr. Rogers has been diagnosed as suffering from mental retardation with an accompanying behavior disorder (poor impulse control) which makes him dangerous to others.

Respondent/Appellant's objections arose at the rehearing held in this matter on June 17, 1982. At that hearing in the District Court, an order was entered finding Mr. Rogers mentally ill and dangerous to himself and others and ordering that he be committed for up to 365 days. No appeal was taken from this portion of the Court's decision. However, at that hearing the State, through the Associate Attorney General, orally moved the Court to find that the provisions of N. C. Gen. Stat. 122-58.8(b), et. seq., be applied to Mr. Rogers. These provisions had become effective the previous July 1, 1981, and this was the first hearing since they came into effect. Respondent/Appellant, through Special Counsel, objected to the application on the grounds that to do so would violate the provisions against ex post facto laws in both the federal and state constitutions, and that the provisions were unconstitutional by violating the Fourteenth Amendment in that they placed Mr. Rogers in a class where certain detrimental restrictions were applied to him that were aimed at others who were not similarly situated. Mr. Rogers contended that the same restrictions were applicable to him as were applicable to those who were proved to have committed violent criminal acts and found not guilty by reason of insanity, when he had not had the opportunity to contest the issue of whether or not he had committed a violent act before a jury. The District Court Judge presiding, the Honorable Claude W. Allen, Jr., took the State's motion under advisement, and requested briefs from both parties on the matter. The State later renewed its motion in writing, and the Court, following the receipt of each party's brief, on August 19, 1982, allowed the motion, and held that Mr. Rogers was subject to the provisions of N. C. Gen.

Stat. 122-58.8(b), et. seq. Notice of appeal to the North Carolina Court of Appeals was filed August 25, 1982.

This case was argued in the North Carolina Court of Appeals on April 14, 1983. The Court of Appeals issued an order dated September 6, 1983 (App. A, infra.), affirming the holdings of the District Court. Judge Webb, writing for the Court, held that the classification was rationally related to a legitimate state interest, "the protection of persons from violent crimes".

> We believe there is a substantial difference between those who have been judicially charged with a crime of violence and those who have not so that the legislature can make the procedure more stringent for the release from a mental institution for this class of persons. (App. A, infra, 4a).

The Court of Appeals also held that N. C. Gen. Stat. 122-58.8(b), et. seq., did not increase punishment for a crime over the applicable punishment at the time the crime was committed, therefore the application of its provisions to Mr. Rogers did not violate the prohibition against ex post facto laws.

Mr. Rogers filed a notice of appeal and a petition for discretionary review on both issues with the North Carolina Supreme Court on September 19, 1983. The State of North Carolina, through the Assistant Attorney General, filed a motion to dismiss the appeal and deny the petition for discretionary review on September 22, 1983. In a Judgment without a written opinion (App. B, infra.) the Supreme Court, on November 3, 1983, allowed the Attorney General's motion to dismiss the appeal, and denied the Respondent/Appellant's petition for discretionary review. Mr. Rogers gave notice of appeal to the Supreme Court of the United States, filed January 23, 1984 (App. E, infra.).

THE QUESTIONS ARE SUBSTANTIAL

The North Carolina courts have held provisions passed by its General Assembly to be constitutional and constitutionally applicable to the Respondent/Appellant despite Mr. Rogers' contentions that the provisions violate equal protection guarantees and

that the application of the provisions to him contravenes the prohibition against ex post facto laws. The courts below clearly erred in holding that the presence of criminal charges, which have not been proved before a jury, justifies the imposition of additional obstacles for release from a mental institution. It was also clearly error for the courts to hold that following the institution of criminal proceedings, it is permissible for the State to require additional incarceration at a mental hospital, and a special hearing before release after the treating professionals have determined that hospitalization is no longer required. The guarantees of personal freedom under the United States Constitution and the guarantees against unjustifiable state encroachment on the individual require this Court to review the holdings of the North Carolina courts with regard to the state legislation. HUFFMAN V. PURSUE, LTD., 420 U.S. 592 (1975); BANTAM BOOKS, INC. V. SULLIVAN, 372 U.S. 58 (1963).

(1) The Fourteenth Amendment to the United States Constitution guarantees to each individual "the equal protection of the laws". This guarantee does not prevent the states from making classifications and treating groups of persons differently based on the classification. EISENSTADT V. BAIRD, 405 U.S. 438 (1972). "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . ." 405 U.S. at 447. This Court has recognized that states must be allowed to make some distinction between classes of individuals, but these classifications and resulting differences in treatment must be closely watched to prevent arbitrary distinctions based on impermissible or irrelevant differences.

The State of North Carolina contends that the purpose of the legislation, as stated in its title, is to provide review of a determination to release "an involuntarily committed mental patient who has committed violent acts". Portions of the legislation, as written, comply with this stated purpose. It provides that

persons who are committed as the result of being charged with a violent crime and are found not guilty by reason of insanity are subject to its restrictions. Under North Carolina law those found not guilty by reason of insanity must have first been found to have committed an act which would normally constitute a crime, but the act is not so considered as a result of the individual's mental condition. To place these individuals within this class, subject to the provisions, is reasonably related to the object of the legislation, because they have been found to have committed violent acts, even if they are not subject to criminal penalties.

To include the second group in this classification, to which the Respondent/Appellant belongs, those who are found incapable of standing trial after having been charged with a violent act, is not related to this purpose. These individuals have not had the opportunity to contest the charges against them. The State has not shown by the required burden of proof that these individuals have committed a violent act, and legislation placing restrictions on those having committed violent acts should not be applicable to this second group. The North Carolina Court of Appeals' holding that ". . . there is a substantial difference between those who have been judicially charged with a crime of violence and those who have not . . ." (App. A, infra, 4a), strikes at the very heart of our criminal justice system. It is a substantial question which should be addressed by this Court, whether a State can place restrictions on an individual for committing an act when the State has not proven the commission of the act.

Several courts have addressed the issue of release restrictions from mental institutions after the commission of violent acts. Both Georgia and Florida placed release restrictions on those found not guilty by reason of insanity who were subsequently committed to a state mental health facility. The United States Court of Appeals for the Fifth Circuit upheld the provisions in both states, reasoning that the "prior anti-social conduct of an insanity acquitee justifies treating such a person differently from

ones otherwise civilly committed . . ." POWELL V. FLORIDA, 579 F.2d 324, at 333 (5th Cir., 1978); see also, BENHAM V. EDWARDS, 678 F.2d 511 (5th Cir., 1982). Neither decision, however, attempted to expand this reasoning to those found not capable of proceeding to trial.

The North Carolina courts have upheld the actions of the state legislature despite the statements of this Court which indicate that such action is prohibited. This Court in INDIANA V. JACKSON, 406 U.S. 715 (1972), dealt with the case of a mentally defective, deaf mute who was committed under special provisions after being found incapable of proceeding on a charge of robbery. Mr. Justice Blackmun, writing for the Court, stated:

> We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.
> 406 U.S. at 738.

The North Carolina provisions are not in compliance with this holding by the Court. JACKSON further indicates that the proceedings must be based in the "articulated bases for exercising" the commitment power of the state. 406 U.S. at 737-738. As shown in Article 5A of Chapter 122 of the North Carolina General Statutes, the bases for commitment rest in the idea of dangerousness to self or others. The presence or absence of criminal charges does not in any way affect the State's bases for commitment, which are already stringent. The placing of additional restrictions as the result of the presence of alleged criminal acts merely hinders the functioning of the treatment staff, who are primarily responsible for providing evidence, or lack of evidence of dangerousness.

This question raised by Mr. Rogers is substantial. Does the State have the authority to circumvent the jury system by

placing the same restrictions on an individual who is accused of committing a violent act as those placed on an individual who has been found by a jury to have committed a violent act? This Court should speak to the issue of whether the states have the power to eliminate the distinction between being accused of having committed a violent crime and having been found to have committed a violent crime.

(2) Article I, section 10 of the United States Constitution clearly prohibits any state legislature from passing an ex post facto law. Mr. Rogers contentions in this matter clearly raise a question which should be addressed by the Court. Can a state pass legislation, without violating the ex post facto law prohibition, which prolongs incarceration at a state facility because of the presence of criminal charges, after the alleged crime is committed? It is clearly established that an ex post facto law is one which increases the punishment for a crime over the punishment which was applicable at the time the act was committed. WEAVER V. GRAHAM, 450 U.S. 24 (1981). The prohibition applies only to criminal statutes. The provisions in question are not found in the North Carolina laws dealing with the criminal courts, but are found codified in that section dealing with civil commitment. This fact, however, is not determinative of their nature.

The provisions complained of here apply only in those cases where the allegation of a criminal act is present. The presence of criminal charges is the triggering mechanism which the North Carolina General Assembly placed within the provisions. Its "form" as a civil enactment is not determinative of the issue. ". . . (I)t is the effect, not the form, of the law that determines whether it is ex post facto. The critical question is whether the law changes the legal consequences of acts completed before its effective date." 450 U.S. at 31. The effect of N. C. Gen. Stat. 122-58.8(b), et. seq., is clearly criminal in nature. It only

applies to individuals committed as the result of having been charged with criminal acts. Further, Mr. Rogers 'circumstances have altered considerably as the result of the imposition of the provisions. At the very least he will be required to remain incarcerated at a state mental institution at least 15 days while he is waiting for the release hearing, after a determination by the treatment staff that he is no longer in need of hospitalization. This does not take into consideration the results in the event that the District Court determines that release is not appropriate and the subject of the hearing is required to remain at the treatment facility despite the facility's opinion that the treatment they can provide is not needed by that individual.

This act became effective more than four and one half years after Mr. Rogers was charged. The provisions, by their own wording are aimed at Mr. Rogers and individuals like him, who already suffer under a dual burden of criminal accusations and commitment to a mental institution. The law is clearly criminal in nature if not in form, and its effect is detrimental to the individuals to whom it is applied. This Court has previously held that a law cannot avoid the ex post facto prohibition but giving a civil form to a criminal act. BURGESS V. SALMON, 97 U.S. 381 (1878). North Carolina has attempted to do so. This Court should speak to that matter in order to preserve substantial individual rights.

CONCLUSION

It is respectfully submitted that probable jurisdiction should be noted.

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OCTOBER TERM, 1983

APPENDIX A

NO. 829DC1139

NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 1983

FILED
1983 SEP -6 AM 8 14
IN THE OFFICE OF
CLERK COURT OF APPEALS
OF NORTH CAROLINA

IN THE MATTER OF:

RALPH CLAPP ROGERS
RESPONDENT

Granville County
No. 78SP243

Appeal by respondent Ralph Clapp Rogers from Allen (Claude), Judge. Order entered 19 August 1982 in District Court, Granville County. Heard in the Court of Appeals 14 April 1983.

In this appeal the respondent challenges the constitutionality of the procedure for his release from commitment to a mental institution. The respondent was indicted in 1976 for murder and a crime against nature. On 6 November 1978 the respondent was found to be incompetent to stand trial by Judge Hobgood. The respondent was committed to John Umstead Hospital. The respondent has had periodic hearings as to his mental condition and has remained committed to John Umstead Hospital since his original commitment.

A hearing was held in June 1982 and Judge Allen found that respondent was dangerous to himself and others and ordered that respondent be committed for a further "period of 365 days or until such time as he is discharged according to law." Upon motion of the State, Judge Allen amended his order to indicate that respondent was within the scope of Article 5A of Chapter 122

of the General Statutes dealing with involuntary commitments. The respondent appealed from the amended order.

Attorney General Edmisten, by Assistant Attorney General Wilson Hayman, for the State.

Special Counsel Stephen D. Kaylor for respondent appellant.

WEBB, Judge.

In 1981 the General Assembly revised G.S. 122-58 so that it now provides that the chief of medical services of a mental health facility shall discharge a committed respondent unconditionally at any time he determines the patient is no longer in need of hospitalization unless the patient was intitially committed as the result of conduct resulting in his being charged with a violent crime for which he was found not guilty by reason of insanity or incapable of standing trial. For all persons in the latter categories, the chief of medical services must notify the Clerk of Superior Court in the county in which the facility is located 15 days before the respondent's discharge. The clerk must then schedule a rehearing to determine the appropriateness of the respondent's release under the standards of commitment set forth in G.S. 122-58.8.

The respondent argues that this section of the statute violates the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Article 1, Section 19 of

the North Carolina Constitution. He contends there is no rational basis for putting him in a class of which the clerk has to be notified and a hearing conducted before he may be released from an institution when others similarly situated may be released at the time the chief of medical services determines they no longer need hospitalization. If a state, by statute, creates a class which is rationally related to a legitimate interest of the state, those placed in the class have not been deprived of the equal protection of the laws. See Hohn v. Slate, 48 N.C. App. 624, 269 S.E. 2d 307 (1980). We believe the State has a legitimate interest in protecting persons from violent crimes. We also believe that requiring those for whom a magistrate or a grand jury has found probable cause that they have committed crimes of violence to be subject to a hearing before release from involuntary commitment is rationally related to the protection of persons from violent crimes.

The respondent argues that the amendment to the statute is not rationally related to the protection from those who pose a threat to the community. He says that he will be required under any circumstances to remain committed until the chief of medical services determines that he is no longer dangerous to himself or others. He further argues that to require a hearing after this has been determined for him but not for others confined for the same reasons does not bear a rational relationship to the protection of society. He points out that there are other protections, such as his reincarceration to await trial, which

are adequate to protect society. The legislature does not have to be perfect in its classification. We believe there is a substantial difference between those who have been judicially charged with a crime of violence and those who have not so that the legislature can make the procedure more stringent for the release from a mental institution for this class of persons.

We do not believe Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed. 2d 435 (1972), relied on by respondent, governs. In that case a mentally retarded person was charged with robbery. He was committed by the trial court which found he "lacked comprehension sufficient to make his defense" until the Indiana Department of Mental Health should certify that "the defendant was sane." Since the evidence showed there was little likelihood the defendant's condition would improve, he had in effect been sentenced to confinement for life without being convicted of the crime. He argued in the United States Supreme Court that he did not receive equal protection of the laws by being confined in an Indiana mental institution without a similar hearing as those who were not charged with violating the law. The United States Supreme Court said:

> "We hold that by subjecting Jackson to a commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by § 22-1209 and § 22-1907, Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment."

Id. at 730, 92 S.Ct. at 1854, 32 L.Ed. 2d at 446. This case differs from Jackson in that respondent is not confined indefinitely. He was committed under a procedure similar to those not charged with a crime and he may be released when he is found not dangerous to himself or others. We do not think requiring a hearing before his release deprives him of equal protection of the laws.

The respondent argues that the revision of G.S. 122-58 was not intended to have retroactive effect and we agree with him. It was not intended to apply to the past releases of patients from mental hospitals. It is intended to apply to the procedure for the release of patients after its effective date and we believe it applies to any discharge of respondent after 1 July 1981.

The respondent also contends this is an ex post facto law and in violation of Article I, Section 10 of the United States Constitution, and Article I, Section 16 of the North Carolina Constitution. If the revision of G.S. 122-58 increases the punishment for a crime over the punishment which was applicable at the time the crime was committed, it is an ex post facto law. See Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed. 2d 17 (1981). We do not believe the procedures required by the revision of G.S. 122-58 comprise punishment for a crime. They are procedures which must be followed for the discharge of a

patient from a mental institution and we believe the State may lawfully enforce them.

Affirmed.

Judges WHICHARD and BRASWELL concur.

APPENDIX B

No. 473P83 NINTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

In the Matter of: RALPH CLAPP ROGERS, Respondent	JUDGMENT DISMISSING APPEAL ON MOTION OF ATTORNEY GENERAL AND DENYING PETITION FOR DISCRETIONARY REVIEW (829DC1139)

****

Upon consideration of the Respondent's notice of appeal from the North Carolina Court of Appeals, filed in this matter pursuant to G.S. 7A-30, and the Attorney General's motion to dismiss the appeal for lack of a substantial constitutional question, and upon consideration of the Respondent's petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals: Attorney General's motion to dismiss the appeal is

> "Allowed by order of the Court in conference, this the 3rd day of November 1983.
>
> s/ Frye, J.
> For the Court"

Respondent's petition for discretionary review is

> "Denied by order of the Court in conference, this the 3rd day of November 1983.
>
> s/ Frye, J.
> For the Court"

Therefore, it is considered and adjudged further that

Respondent do pay the sum of Nine and no/100 Dollars ($9.00) and that execution issue therefor.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of November 1983.

J. GREGORY WALLACE
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Mr. Stephen D. Kaylor, Special Counsel
Mr. Wilson Hayman, Assistant Attorney General

83-6186

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN THE MATTER OF : RALPH CLAPP ROGERS, RESPONDENT) APPLICATION TO PROCEED IN FORMA PAUPERIS

Ralph Clapp Rogers, the Respondent/Appellant in the above entitled action, hereby moves the Court for an Order granting leave to proceed in the above-entitled action without being required to prepay fees or costs, or to give security therefor. This motion is based on the attached affidavits as to Respondent/Appellant's inability to pay the cost of the above-entitled action or to give security therefor, and his belief that he is entitled to relief.

This the 27th day of January, 1984.

RAPFRb
Respondent/Appellant

Stephen D. Kaylor

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN THE MATTER OF: RALPH CLAPP ROGERS, RESPONDENT	)	AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, RALPH CLAPP ROGERS, being first duly sworn, depose and say that I am the Respondent/Appellant in an appeal filed in the above-entitled action requesting relief pursuant to 28 U.S.C. 1257(2); that in support of my motion to proceed without being required to prepay fees, costs, or give security therfor, I state that because of my poverty, I am unable to pay the costs of the proceeding or to give security therefor; that I believe that I am entitled to relief.

I further swear that the information contained below is true to the best of my knowledge.

1. That I am not presently employed, and that it has been in excess of eight years that I have been in various state institutions and have not had the opportunity to seek employment.

2. That within the past twelve months I have not received any money from a business, profession, self-employment, rents, interest, dividends, pensions, annuities, life insurance payments, gifts, inheritances, or any other source, other than occasional spending money provided through hospital sources which has not been in excess of two to three dollars for a seven day period, when such funds were available.

3. I do not have any cash and do not have any money in a checking or savings account, except $22.00 in a patient account.

4. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

5. There are no other persons dependent upon me for support, and at the present time I am entirely dependent upon the State of North Carolina due to my commitment to John Umstead Hospital.

I understand that a false statement or answer to any of the foregoing responses in this affidavit will subject me to penalties for perjury.

RALPH CLAPP ROGERS

STATE OF NORTH CAROLINA
COUNTY OF GRANVILLE

Ralph Clapp Rogers, being first duly sworn under oath presents that he has read, or has had read to him, the above, subscribes to it and states that the information therein is true and correct.

RALPH CLAPP ROGERS

Subscribed and ~~Sworn~~ affirmed to
before me this the 27 day
of January, 1984.

Notary Public
My Comm. expires: January 4, 1989

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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

No. 83-6186

IN THE MATTER OF

RALPH CLAPP ROGERS,

Respondent.

On Appeal From The

Supreme Court of North Carolina

Motion To Dismiss Appeal

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IN THE
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OCTOBER TERM 1983

No. 83-6186

IN THE MATTER OF

RALPH CLAPP ROGERS,

Respondent.

Motion To Dismiss Appeal

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully moves this Honorable Court to dismiss the above-captioned appeal on the ground that the appeal fails to present any substantial federal question and that consequently this case is not one for appeal.

OPINIONS BELOW

The judgment of the Supreme Court of North Carolina is reported in 309 N.C. 633, 308 S.E. 2d 716 (1983). The opinion of the North Carolina Court of Appeals is reported in 63 N.C. App. 705, 306 S.E. 2d 510 (1983).

STATEMENT

This is a direct appeal from the judgment of the Supreme Court of North Carolina filed on November 3, 1983, which denied appellant's petition for discretionary review and allowed the state's motion to dismiss the appeal for lack of a substantial constitutional question. By its order, the North Carolina Supreme Court denied further review of the opinion of the North Carolina Court of Appeals which affirmed the order entered 19 August 1982 in Granville County District Court. The Court of Appeals had found that appellant's release from the treatment facility was governed

by the amended statute in question as a matter of state law and that the statute thus applied did not deprive appellant of his constitutional rights.

Here, appellant was found incapable of proceeding to trial in Granville County Superior Court on charges of murder and crime against nature with mankind on November 9, 1978. Pursuant to N.C. Gen. Stat. § 15A-1003(a)(1975), the court's order directed that involuntary commitment proceedings be initiated, and that a magistrate should thus issue an order to the Granville County Sheriff's Department to take appellant into custody and be examined by a local physician. Appellant was admitted to John Umstead Hospital, a state-operated psychiatric facility, on the next day as a result of these proceedings. At an involuntary commitment hearing held on November 16, 1978, appellant was committed by order of Granville County District Court to Umstead Hospital, where by virtue of numerous subsequent rehearings he has remained continuously on an involuntary basis every since.

Subsequently, a third or more rehearing was held in this matter on July 17, 1982 in Granville County District Court before the Honorable C. W. Allen, Jr., Chief District Judge, pursuant to N.C. Gen. Stat. § 122-58.11 (1981). After hearing the evidence, the court entered an order finding appellant to be mentally retarded with a behavior disorder and dangerous to self and others and committing him for another period of 365 days. Neither notice of appeal nor exception was taken by appellant to this order. At this hearing, the State through the Attorney General made an oral motion for the order of commitment to indicate that the commitment proceedings had been initiated pursuant to N.C. Gen. Stat. § 15A-1003(a)(1975) as a result of appellant's being charged with a violent crime and appellant had been

found incapable of proceeding to trial on the charges. Upon appellant's objection the court took the matter under advisement and requested that briefs be submitted by both parties on this issue. The court subsequently entered an order dated August 19, 1982 allowing the State's motion and placing appellant's case within the scope of the 1981 amendment to Article 5A of the General Statutes. Appellant's appeals to the Court of Appeals and Supreme Court of North Carolina were based solely upon this order of August 19, 1982.

In June, 1981 the North Carolina General Assembly ratified House Bill 95, entitled "An Act to Provide Judicial Review of a Psychiatrist's Determination to Release an Involuntarily Committed Mental Patient Who Has Committed Violent Acts," to become effective July 1, 1981. 1981 N.C. Sess. Laws 808, amended by 1983 N.C. Adv. Legis. Serv. ch. 380. That Act amended Chapter 122 of the North Carolina General Statutes to provide that when commitment proceedings were initiated as a result of the respondent's being charged with a violent crime, and the respondent was found either not guilty by reason of insanity or incapable of proceeding, the commitment order should so indicate. N.C. Gen. Stat. § 122-58.8(b)(Supp. 1983). A special set of procedures were made applicable to this set of respondents, including a requirement that the Clerk of Superior Court must notify the chief district judge, clerk of superior court and district attorney in the originating county of the time and place of every rehearing in such cases. N.C.Gen.Stat. § 122-58.11(a)(Supp. 1983). The sole change created by the amendment which affected appellant, however, was the provision for a court hearing to determine the appropriateness of releasing a respondent previously charged with a violent crime. Thus, N.C.Gen. Stat. § 122-58.13(b)(Supp. 1983) as amended states that for such a respondent:

> 15 days before the respondent's discharge or conditional release the chief of medical services of a public or private mental health facility shall notify the clerk of the county in which the facility is located of his determination that the respondent is no longer in need of hospitalization. The clerk must then schedule a rehearing to determine the appropriateness of respondent's release under the standards of commitment set forth in G.S. 122-58.8. The clerk shall give notice as provided in G.S. 122-58.11(a). The district attorney of the district where respondent was found not guilty by reason of insanity or incapable of proceeding may represent the State's interest at the hearing.

The venue of either an initial hearing or subsequent rehearing in such cases shall be moved to the county in which the criminal proceedings were held "when the convenience of witnesses and the ends of justice would be promoted by the change." N.C.Gen.Stat. § 122-58.7A(c)(Supp. 1983). Appellant now contends that the application of this statutory provision to the facts of this case violates his constitutional rights and presents a substantial federal question warranting appeal to this Court.

QUESTIONS PRESENTED

I. Is there a substantial Federal question involved where state statutes require a court hearing to determine the appropriateness of releasing a civilly committed respondent previously charged with a violent crime and found incapable of proceeding or not guilty by reason of insanity, although other committed respondents may be released without a judicial determination but based upon the same standard of commitment?

II. Is there a substantial Federal question involved where, under the facts of this case, state statutes require a court hearing to release a civilly committed respondent previously charged with a violent crime and found incapable of proceeding, although the respondent has already been charged, found incapable of proceeding and civilly committed prior to the effective date of the statutes in question?

ARGUMENT

I. There is no substantial Federal question involved where state statutes require a court hearing to determine the appropriateness of releasing a civilly committed respondent previously charged with a violent crime and found incapable of proceeding or not guilty by reason of insanity, although other committed respondents may be released without a judicial determination but based upon the same standard of commitment.

Appellant first contends that this case involves a substantial federal question on the grounds that N.C. Gen. Stat. § 122-58.7A, et seq. (1981) as applied to a person charged with a violent crime and found incapable of proceeding to trial violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. As discussed above, N.C.Gen.Stat. § 122-58.13(b) (1983) provides that if a respondent was initially committed as a result of being charged with a violent crime, and he was found not guilty by reason of insanity or incapable of proceeding, the mental health facility must notify the clerk of superior court of the determination that respondent is no longer in need of hospitalization fifteen days prior to respondent's planned release. The clerk must then schedule a court hearing to determine the appropriateness of respondent's release under the standards of commitment governing all civilly committed respondents. See N.C.Gen. Stat. §§ 122-58.13(b), .8(a)(1983).

Appellant concedes in his Jurisdictional Statement that the State of North Carolina may properly apply these procedures requiring a court hearing for release to respondents who have been found not guilty by reason of insanity, since placing these individuals within this class is reasonably related to the object of the legislation. This question is well settled and needs no further discussion here. See Benham v. Edwards, 678 F. 2d 511 (5th Cir. 1982), vacated and remanded, _____U.S._____, 103 S.Ct. 3565, 77 L.Ed. 2d 1406 (1983); Powell v. Florida,

579 F. 2d 324 (5th Cir. 1978). Moreover, Jones v. United States, _____U.S._____, 103 S.Ct. 3043, 77 L.Ed. 2d 694 (1983), this Court recently addressed the rights of persons found not guilty by reason of insanity and subsequently committed to a psychiatric facility. The Court held that when a criminal defendant is found not guilty by reason of insanity, the Constitution permits the state to confine him to a mental hospital until such time as he has regained his sanity or is no longer a danger to himself or others, and due process does not require the same standard of proof or other procedural safeguards that are called for in the normal commitment situation. See Bolton v. Harris, 395 F. 2d 642 (D.C.Cir. 1968); People v. Giles, 192 Colo. 240, 557 P. 2d 408 (1976); State ex rel. Kovach v. Schubert, 64 Wis. 2d 612, 219 N.W. 2d 341 (1974).

Clearly the equal protection clause of the United States Constitution does not take from the state the power to classify persons when there is a reasonable relation between the classification and the object of the statute. Carrington v. Rash, 380 U.S. 89 (1965); Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459 (1937). When an equal protection claim does not involve a "suspect class" or the exercise of a fundamental right, the distinctions drawn by the challenged statute must merely bear some rational relationship to a conceivable legitimate governmental interest. New Orleans v. Dukes, 427 U.S. 297 (1976); Hagans v. Lavine, 415 U.S. 528 (1974). Perfection is not required for purposes of equal protection analysis under the standard which inquires whether a classification is rationally related to furthering a legitimate state interest. Vance v. Bradley, 440 U.S. 93 (1979).

In French v. Blackburn, 428 F. Supp. 1351 (M.D.N.C. 1977), aff'd. 443 U.S. 901 (1979), the civilly committed respondent contended that his right to equal protection of the laws had

been denied because he was not entitled to a jury trial in involuntary commitment proceedings, whereas such was available to those persons subjected to lunacy proceedings under N.C.Gen. Stat. § 35-2 for the appointment of a guardian. The three judge panel of the United States District Court rejected this argument in part upon the grounds that these two classes of persons were not similarly situated for purposes of equal protection analysis. The court went on, however, to state that even if the classification did affect persons similarly situated, the rational basis test would be applied and that the statutory differences in treatment would meet that test. Thus, the rational basis test is applied to involuntary commitment proceedings, unless the challenged statute classifies persons in terms of the exercise of a fundamental right or on some "suspect" basis. See French v. Blackburn, id.; New Orleans v. Dukes, 427 U.S. 297 (1976). Clearly the rational basis test would apply here based on the facts of the instant case.

Although conceding that those found not guilty by reason of insanity may reasonably be included in this classification, appellant contends that as it affects those found incapable of proceeding this classification is not reasonable and is without any substantial relation to the object of the legislation. To comport with the requirements of equal protection, a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).

Appellant cites Jackson v. Indiana, 406 U.S. 715 (1972), for the proposition that one who has been charged with a crime

and found incapable of proceeding cannot be treated as a special class for the purposes of civil involuntary commitment. That case involved a state statute which provided for a more lenient commitment standard and a more stringent standard of release for that class of persons than those standards applicable to persons not charged with offenses. The challenged statute, by committing the defendant until "sane," in effect committed him indefinitely solely on account of his lack of capacity to stand trial. On this basis this Court held that these procedures condemning the petitioner in Jackson to permanent institutionalization without the showing required for commitment or an opportunity for release deprived him of equal protection of the laws. The Court stated further that a person charged with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held for more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain capacity in the near future. If it is determined that this is not the case, then the state must either institute the customary civil commitment proceeding or release the defendant. But cf. Jones v. United States, _____U.S._____, 103 S.Ct. 3043, 77 L.Ed. 2d 694 (1983)(indefinite civil commitment constitutional for persons acquitted by reason of insanity).

Unlike the Indiana procedures challenged in Jackson, however, the provisions of N.C.Gen. Stat. § 122-58.7A, et seq. (1983) do not allow a respondent to be committed because of his incapacity to proceed. Instead,North Carolina law requires that such a respondent must be civilly committed according to the same standard applicable in the case of any non-criminal. See N.C.Gen.Stat. § 122-58.8 (1983). Nor do the applicable state statutes permit an indefinite commitment "until sane" as did those at issue in Jackson. Periodic rehearings pursuant to N.C. Gen.

Stat. § 122-58.11(1983) must be held for those who fall under the 1981 amendment as for all other committed respondents, and the same standard of commitment applied initially must again be met at each rehearing.

Appellant contends that to include those found incapable of proceeding within the statutory classification as well as those found not guilty by reason of insanity does not bear a fair and substantial relation to the object of the legislation. The legislation enacting the amendment was entitled "An Act to Provide Judicial Review of a Psychiatrist's Determination to Release an Involuntarily Committed Mental Patient Who Has Committed Violent Acts." 1981 N.C. Sess. Laws 808. Accordingly, a primary purpose of the Act was to provide for judicial monitoring of the release of such patients. This amendment was enacted in an attempt to redress a perceived imbalance in the current laws, which permitted psychiatrists at a treatment facility to discharge outright a patient who had been charged with a violent crime and had been committed through the criminal justice system.

As conceded by appellant in the court below, the statutory amendment does not alter the standard of commitment to render release of such patients more difficult than release of any other committed patient. Instead, it merely insures that the officials in the community who were responsible for the initiation of commitment are notified of all rehearings, so that a full and fair hearing can be held to determine the appropriateness of the patient's recommitment or release. Nor would the requirement that the chief of medical services request a rehearing fifteen days before the respondent's planned discharge be unreasonable. See French v. Blackburn, 428 F.Supp. 1351. Clearly the legislative purpose behind the amendment has been accomplished

by this enactment.

Appellee also notes that courts in other jurisdictions have upheld statutory procedures providing for a judicial determination of the appropriateness of release in such cases. An example is a New York statute which provides that when a defendant is in the custody of the commissioner of mental hygiene after being found incapable of proceeding to trial, he may not be discharged, conditionally released or placed on any temporary pass unless written notice is delivered at least four days in advance of the change of status to the district attorney in the county where the person was committed and to other appropriate persons. N.Y. Crim. Proc. Law § 730.60(6)(a)(McKinney 1982). The district attorney may apply for an order directing a hearing to be held within ten days to determine whether the committed person is a danger to himself or others. Id. § 730.60(6)(c).

In People v. Jones, 114 Misc. 2d 31, 449 N.Y.S. 2d 409 (1982), the New York Supreme Court concluded that to permit the district attorney to have a hearing prior to any change in the respondent's status would not violate the respondent's constitutional rights. In refusing to apply a strict construction to weaken the statute's requirement of notice and hearing, the court observed that the purpose of the law in requiring notice and hearing prior to release was "to protect the public safety by applying closer scrutiny to any changes in status proposed in regard to incapacitated defendants...." Id. at_____, 449 N.Y.S. 2d at 412. The court further stated as follows:

> "The public acquires a special interest in their confinement and release, which therefore must be considered by the Court. When consideration is being given to the release of such a person, that public interest must be weighed against the claimed right to be set free."
>
> . . . .
>
> This Court held in People v. Bradley Wesson, August 14, 1981, that the District

Attorney was entitled to a hearing noting that "[i]t would serve no purpose to require the mental facility to give notice to the People of their intention to release the patient without giving the People the right to a hearing."

Id. at ____, 449 N.Y.S. 2d at 413. See People v. Jones, 112 Misc. 2d 841, 447 N.Y.S. 2d 612 (1982); see also, People v.Arendes, 92 Misc. 2d 372, 400 N.Y.S. 2d 273 (1977).

In its opinion below, the North Carolina Court of Appeals held that "requiring those for whom a magistrate or grand jury has found probable cause that they have committed crimes of violence to be subject to a hearing before release from involuntary commitment is rationally related to the protection of persons from violent crimes," and that requiring a court hearing to determine the appropriateness of the release of such persons does not deprive them of equal protection of the laws. 63 N.C.App. at 706-07, 306 S.E. 2d at 512. The Supreme Court of North Carolina dismissed appellant's appeal on this basis. Since the statutory amendment at issue clearly bears a fair and substantial relation to the object of the legislation, no substantial federal question is involved here.

II. There is no substantial Federal question involved where, under the facts of this case, state statutes require a court hearing to release a civilly committed respondent previously charged with a violent crime and found incapable of proceeding, although the respondent has already been charged, found incapable of proceeding and civilly committed prior to the effective date of the statutes in question.

Appellant also contends that the provisions of N.C. Gen. Stat. § 122-58.7A, et seq. (1983) governing appellant's release from civil commitment may not be applied to those initially committed to a mental health facility prior to the effective date of the legislation, because to do so would constitute an ex post facto law prohibited by Article I, Section 10 of the United States Constitution. Appellant

thus maintains that the application of this statutory amendment to the case sub judice has the effect of prolonging his "incarceration" and therefore increases the punishment for the crime in violation of the constitutional prohibition.

In Dobbert v. Florida, 432 U.S. 282, rehearing denied, 434 U.S. 882 (1977), this Court held that the Constitution prohibits as ex post facto a statute which either "punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed." Id. at 292, citing Beazell v. Ohio, 269 U.S. 167 (1925). However, even though a procedural change may work to the disadvantage of a defendant, it is not ex post facto. Id.; Beazell v. Ohio, 269 U.S. 167. The constitutional prohibition limits the powers of the states only with regard to the imposition of punishment, and legislation has been held not to violate the prohibition against ex post facto laws when it was not penal in character. Bankers Trust Co. v. Blodgett, 260 U.S. 647 (1923).

The North Carolina Court of Appeals held below that the statutory amendment in question applied to appellant but did not violate the prohibitions against ex post facto laws found in either the United States or North Carolina Constitutions. The court based its opinion on the grounds that the relevant procedures did not constitute punishment for a crime but merely concerned the discharge of a patient from a mental health facility. This conclusion is consistent with the decisions reached by the courts of other states holding that statutes providing for the commitment of persons acquitted of a crime by reason of insanity, which commitment is imposed not as

punishment but for the protection of society and treatment of the individual, do not violate the prohibition against ex post facto laws when applied to a case in which the crime was committed before the commitment statute was passed. Ex parte Clark, 86 Kan. 539, 121 P. 492 (1912); see People v. Chapman, 301 Mich. 584, 4 N.W. 2d 18 (1942).

An examination of the facts of the instant case reveals that this constitutional prohibition clearly does not apply here. N.C.Gen.Stat. § 122-58.7A, et seq. (1983) does not involve either incarceration or punishment as contended by appellant. The statutory amendment at issue is not criminal in nature but merely provides for a prompt judicial determination of the appropriateness of a respondent's discharge from involuntary hospitalization. The appropriateness of this discharge is determined by the same legal standard that governs all civil commitments. See N.C.Gen.Stat. § 122-58.13(1983). Nor does the statutory amendment require that respondents falling within this classification be held longer than other committed patients prior to discharge from the facility. Instead, N.C.Gen. Stat. § 58.13(b)(1983) merely states that fifteen days before the facility intends to discharge such a respondent, the chief of medical services shall notify the clerk of superior court who must then schedule a rehearing to determine the appropriateness of the respondent's release. Such a discharge date is normally the subject of considerable prior planning by the treatment staff concerned. The clerk shall subsequently notify the chief district judge and other appropriate persons of the time and place of the hearing, as must be done for any rehearing governing this class of respondents. See N.C.Gen.Stat. § 122-58.11(a)(1983). In balancing the rights of the public with those of a respondent committed by reason of being charged with a violent crime, these provisions for notice and a judicial

hearing would not adversely affect a respondent substantially nor would they violate his constitutional rights. See People v. Jones, 114 Misc. 2d 31, 449 N.Y.S. 2d 409 (1982).

This lack of any adverse consequences is particularly clear in appellant's case, since appellant is a chronic mental patient civilly committed to John Umstead Hospital prior to, at the time of and since the commission of the offense. Here, the chief of medical services has never requested a court hearing to determine the appropriateness of appellant's release. Since the statutes in question are not criminal in nature and neither have had nor will have any detrimental effect on appellant, there is no substantial federal question involved here.

CONCLUSION

WHEREFORE, for the above-stated reasons, it is respectfully submitted that this appeal should be dismissed.

Respectfully submitted, this the 24th day of February, 1984.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion to Dismiss Appeal was this day served upon counsel for appellant by mailing a copy thereof, first class postage prepaid, addressed as follows:

Mr. Stephen D..Kaylor
Special Counsel
John Umstead Hospital
Butner, North Carolina 27509.

This the 24th day of February, 1984.

William F. O'Connell
Special Deputy Attorney General